

A/2
Cont

and n_2 represents the average refractive index of the totality of said at least one silicone oil, then:

$$0 < |n_1 - n_2| \leq 0.3.$$

A/3

60. (Once amended) The emulsion according to claim 12, wherein said emulsion further comprises additives present in a proportion ranging from greater than 0 to 10% by weight.

A/4

66. (Once amended) A process for the non-therapeutic treatment [process for] of the skin and/or keratin fibres, comprising applying an effective amount of an emulsion according to claim 12 and/or a composition containing an emulsion according to claim 12 to said skin and/or to said keratin fibres.

Please add new claim 67:

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--67. The emulsion according to claim 30, wherein said poly(C₁-C₂₀)alkylsiloxanes are chosen from phenylsilicone oils.--

REMARKS

I. Status of the Claims

Claims 1-60 and 62-67 are now pending in this application. Claim 61 has been canceled. Claims 1, 2, 12, 27, 30, 32, 56, and 66 have been amended to further clarify the scope of the invention. In particular, the limitations of claim 61, now canceled, have been incorporated into claim 12. Support for this amendment

can also be found in the present specification, page 21, lines 2-6. Claims 18, 21, 24, 25, 36, 43, 50-52, and 60 have been amended to further clarify the scope of the invention in light of the Examiner's suggestions. Claims 24 and 25 have been amended to correct inadvertent typographical errors. No new matter has been introduced by these amendments, as will be discussed further below.

II. Rejections Under 35 U.S.C. § 112

Claims 18, 21, 27, 32, 33, 36, 43-45, 50-54 and 60 have been rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to point out distinctly and claim the subject matter which the Applicants regard as the invention for various reasons set forth on pages 2 and 3 of the Office Action. The Applicants respectfully traverse this rejection for the reasons set forth below.

The primary purpose of the definiteness requirement is to "ensure that the scope of the claims is clear so the public is informed of the boundaries of what constitutes infringement of the patent." M.P.E.P. § 2173. An examiner is directed to allow claims that define the subject matter "with a reasonable degree of particularity and distinctness." M.P.E.P. § 2173.02. Although an examiner is "encouraged" to suggest alternative claim language to improve the clarity of the language used, an examiner is prohibited from rejecting claims if the Applicants' language satisfies the statutory requirements. M.P.E.P. § 2173.02.

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The claim must meet the threshold requirements of clarity and particularity.

Accordingly, the Manual of Patent Examining Procedure sets forth:

Definiteness of claim language must be analyzed, not in a vacuum, but in light of:

- (A) The content of the particular application disclosure;
- (B) The teachings of the prior art; and
- (C) The claim interpretation that would be given by one possessing the ordinary level of skill in the pertinent art at the time the invention was made.

M.P.E.P. § 2173.02.

A. Claims 18, 21, 36, 43, 51, 52, and 60

The Office rejects and requests clarification of claims 18, 21, 36, 43, 51, 52 and 60 alleging that these claims are improper because the claims recite a lower limit of zero for an element, while simultaneously depending on a claim that recites that element as being required. In light of the interpretation that one skilled in the art would give, the Applicants respectfully submit that the request for clarification is misplaced and respectfully traverse this rejection for the reasons set forth below.

The Applicants submit that the Office has not analyzed the language of the claims with respect to the interpretation that one possessing ordinary level of skill in the pertinent art at the time the invention was made would have given. One with ordinary skill in the art would interpret claims 18, 21, 36, 43, 51, 52 and 60 as

reciting emulsions that have the additional elements in amounts ranging to values so small that the amounts are incalculable as they approach zero. An infinitesimal amount is defined as an amount "[i]mmeasurably or incalculably minute" and as amounts "[c]apable of having values approaching zero as a limit." The American Heritage College Dictionary at 696 (3d ed. 2000). Accordingly, an amount "incalculably minute" can not be assigned a specific number value, and it is reasonable to define that value by a limit, which in this case is zero. The boundaries of a patent containing such a claim would be clear to the public.

Nevertheless, to advance prosecution, the Applicants have amended claims 18, 21, 36, 43, 51, and 52 to recite amounts ranging from "greater than 0" as the lower limit. Clearly, the Applicants did not intend for the amounts of the recited elements, e.g., the pigment(s) in claim 18, to be zero, as evidenced by the recitation of these elements in the broader claims, e.g., claim 15, on which claim 18 depends. Thus, as amended, the claims meet the threshold requirements of definiteness under 35 U.S.C. § 112, second paragraph. Accordingly, the Applicants respectfully request that this point of rejection be withdrawn.

B. Claim 27

Claim 27 is rejected "because it appears to be missing some important elements." What was really missing was the verb "is," the result of a typographical error. The Applicants have thus amended the claim to recite that the silicone oil is

chosen from cyclic polydiorganosiloxanes. Support for this amendment is in the specification at, for example, page 12, lines 4-6. Accordingly, the Applicants respectfully request that this point of rejection be withdrawn.

C. Claim 32

Claim 32 is rejected as indefinite "because it is unclear to which silicones the claim is referring." The Applicants thank the Office for pointing this out. The recitation of "silicones" in claim 32 should be "silicone gums" instead. The Applicants have therefore amended claim 32 to recite that the silicone gums of claim 30 are present in an amount up to 5% by weight of active material in the final emulsion. The Applicants direct the Examiner's attention to the specification at, e.g., page 14, lines 3-11, wherein basis for this amendment can be found. Likewise, the Applicants respectfully request that this point of rejection be withdrawn.

D. Claims 44 and 45

Claims 44 and 45 are rejected as indefinite "because it is unclear what the 'active principles' are" and, "[t]herefore, the metes and bounds of the claims cannot be determined." The Office asserts that because the specification sets forth specific examples of active principles (page 17, lines 11-13) the claims must be limited to those specific examples disclosed. The Applicants respectfully traverse the rejection.

The specification at page 17, lines 11-12, provides that "[t]he aqueous phase may also comprise active principles such as...." The key words in this line of the specification are "such as." This language merely sets forth examples of the active principles that may be used, and it is not limited to those expressly listed. Accordingly, the specification includes "any active principle, which includes any substance that is added to the composition," as the Office correctly points out. In the instant case, the Applicants wish to claim in the broadest terms possible and do not choose to limit the claim according to the suggestion of the Office. Breadth is not indefiniteness under § 112, second paragraph, (see M.P.E.P. § 2173.04 (citing *In re Miller*, 441 F.2d 689, 169 USPQ 597 (CCPA 1971))) even when the breadth is immense (*Application of Robins*, 429 F.2d 452, 458, 166 USPQ 552, 552 (CCPA 1970)). Accordingly, the Applicants respectfully submit that this rejection is improper and request that it be withdrawn.

E. Claim 50

Claim 50 is rejected for having an uncertain scope due to the recitation of the trademark/trade name of "Teflon." The Applicants assert that Teflon is used to identify/describe tetrafluoroethylene fluorocarbon polymers and/or fluorinated ethylene-propylene resins. Richard J. Lewis, Sr., Condensed Chemical Dictionary 1119 (1993). Accordingly, claim 50 has been amended to recite the chemical name instead of the tradename. Thus, the Applicants respectfully request that the rejection be withdrawn.

F. Claims 53 and 54

With respect to claims 53 and 54, the Office does not state any basis for its rejection of these two claims. To the extent the claims were rejected as depending from an allegedly improper claim, claim 50, that claim has been amended. Thus, such a defect has been cured. Accordingly, the Applicants respectfully submit that the rejection was in error, or alternatively is made moot by amendment, and request that the rejection be withdrawn.

III. Rejections Under § 102(b)

Claims 1-19, 23-33, 36, 39-52, 54, and 56-66 are rejected under 35 U.S.C. § 102(b) as being anticipated by EP 0 374 332 (EP '332) for the reasons set forth on pages 4-5 of the Office Action and claims 1-19, 23-33, 36, 38-52, 54-66 are rejected under 35 U.S.C. § 102(b) as being anticipated by EP 0 331 833 (EP '833) for the reasons set forth on pages 5-6 of the Office Action. The Applicants respectfully traverse these rejections for the reasons set forth below.

A. EP 0 374 332 (EP '332)

The Office asserts that EP '332 anticipates claims 1-19, 23-33, 36, 39-52, 54, and 56-66, because EP '332 allegedly discloses a water-in-oil emulsion comprising a silicone oil, a solid wax, water, and a polyoxyalkylene modified organopolysiloxane. The Office points in particular to formula (C) at page 3 of the reference as corresponding to the presently claimed oxyalkylenated silicones and

also points to a number of specific places in the references for teachings of the dependent claims. The Applicants respectfully traverse the rejection.

In order for an anticipation rejection to be proper, "each and every element as set forth in the claim" must be expressly or inherently described in a single prior art reference. *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). To anticipate the present claims successfully, a reference must show "the identical invention" "in as complete detail as is contained in the ... claim[s]." *Richardson v. Suzuki Motor Co.*, 868 F. 2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989). With respect to EP '332, these requirements have not been met.

The process claims, claims 1, 2, and 66, all require "at least one α,ω -substituted oxyalkylenated silicone" in an "amount effective" for specific purposes, respectively reducing or eliminating transfer or migration, improving staying power, and a non-therapeutic treatment. To the contrary, EP '332 does not disclose any of these specifically recited "effective" amounts of an α,ω -substituted oxyalkylenated silicone. Further, nothing in EP '332 indicates any recognition on the part of the patentees that the silicone in such an "effective" amount would be responsible for these characteristics, *i.e.*, reducing or eliminating transfer or migration, improving staying power, or providing non-therapeutic treatment.

In fact, EP '332 does not discuss at all the reduction or elimination of transfer or migration, the improvement of staying power, or the use of its compositions for the non-therapeutic treatment of skin or keratin fibers. Because EP '332 is silent as

to these elements of the present claims, it cannot anticipate these claims. As for the Office's argument that these properties are inherent in the addition of oxyalkylenated silicones into the compositions, the Applicants disagree. The only basis the Office has for such an assumption is hindsight, which, as the Office surely knows, is improper.

With respect to the composition claims, particularly claim 12, EP '332 does not disclose the identical composition of claim 12, nor does it disclose the identical composition in combination with the specific components listed in claim 12, therefore, EP '332 cannot anticipate this claim. Claim 12 is directed toward a different combination of elements than is found in EP '332, and this combination employs a different α , ω -substituted oxyalkylenated silicone. Specifically, it is apparent that the number of dimethylsilicone units in the formula of claim 12 is equal to 101 ($m = 100$ plus one additional unit attached to the R on the far left of the structure), whereas the number of dimethylsilicone units in EP '332 cannot exceed 100 (m ranges from 5 to 100). EP '332 is clearly limited to this range and the present invention does not overlap.

Further, in the at least one α , ω -substituted oxyalkylenated silicone of claim 12, R (found at each end of the silicone), is defined as



This structure is different from the structure disclosed in EP '332 at formula (C), page 3, and formula (3) of claim 1, which provide that the corresponding end group is

$R'(OC_2H_4)_x(OC_3H_6)_y(O)(CH_2)_p$ - where R' can be CH_3 .

Thus, the $(OC_2H_4)_x$ units and $(OC_3H_6)_y$ units of the two silicones are arranged in a different order.

Accordingly, the α , ω -substituted oxyalkylenated silicone of the present invention is not "identical" to that of EP '332, so for this reason alone, at least claim 12 and its dependent claims, and further claim 9, which also recites $m = 100$, cannot be anticipated under § 102(b).

Nevertheless, to advance prosecution, the Applicants have amended claim 12, the broad claim from which claims 13-66 depend, to include the specific viscosity measurement previously recited in claim 61 and in the present specification at page 21, lines 2-6. As amended, the claims are directed toward liquid emulsions and are therefore beyond the scope of EP '332, which is directed only to solids. See, e.g., page 3, line 3-4 of the reference, stating that in accordance with the invention "there is provided a water-in-oil type emulsified solid cosmetic composition . . ." (emphasis added). EP '332 is silent as to viscosity measurements of its compositions, not because viscosity is an inherent characteristic, as alleged by the Examiner, but because the viscosity of solid compositions cannot be measured. Accordingly, EP '332 cannot be said to anticipate the present claims under § 102(b). Accordingly, the Applicants respectfully request that the Office withdraw the rejection.

B. EP 0 331 833 (EP '833)

The Office asserts that claims 1-19, 23-33, 36, 38-52, and 54-66 are anticipated by EP 0 331 833 (EP '833) because EP '833 allegedly discloses a water-in-oil emulsion comprising one or more oxyalkenylated silicones, an aqueous phase and an oil phase containing an organic silicone resin. The Office points in particular to formula (C) at page 6 of the reference as corresponding to the presently claimed oxyalkylenated silicones and also points to a number of specific places in the references for teachings of the dependent claims, alleging that introducing an "oxyalkylenated silicone into the compositions inherently produces a composition with reduced transfer or migration, or inversely, increased staying power." The Applicants respectfully traverse the rejection.

As set forth above, a reference applied under §102 must teach each and every element of the rejected claim in order to properly anticipate it. EP '833 fails to meet this requirement.

With respect to the process claims, claims 1, 2, and 66, which recite the oxyalkylenated silicone in an "amount effective" for, respectively, eliminating transfer or migration, improving staying power, and non-therapeutic treatment, EP '833 does not disclose any of these specifically recited "effective" amounts of an α,ω -substituted oxyalkylenated silicone. Further, like EP '332, discussed above, nothing in EP '833 indicates any recognition on the part of the patentees that the silicone in such an "effective" amount would be responsible for these characteristics, *i.e.*,

reducing or eliminating transfer or migration, improving staying power, or providing non-therapeutic treatment.

In fact, EP '833 does not teach at all the reduction or elimination of transfer or migration, the improvement of staying power, or the use of its compositions for the non-therapeutic treatment of skin or keratin fibers. Because EP '833 is silent as to these elements of the present claims, it cannot anticipate these claims. As for the Office's argument that these properties are inherent in the addition of oxyalkylenated silicones into the compositions, the Applicants disagree and take the position that such an assumption could only be based on improper hindsight.

With respect to the composition claims, particularly claim 12, EP '833 does not disclose the identical composition of claim 12, nor does it disclose the identical composition in combination with the specific components listed in claim 12, therefore, EP '833 cannot anticipate this claim. Claim 12 is directed toward a different combination of elements than is found in EP '833, and this combination employs a different α , ω -substituted oxyalkylenated silicone. The differences between the formula of claim 12 and the formula (C) of EP '833 are exactly the same as those discussed above for formula (C) of EP '332. Specifically, the number of dimethylsilicone units in the formula of claim 12 is equal to 101 whereas the number of dimethylsilicone units in EP '833 cannot exceed 100, and also, the $(OC_2H_4)_x$ units and $(OC_3H_6)_y$ units of the two silicones are arranged in a different order.

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Accordingly, the α , ω -substituted oxyalkylenated silicone of the present invention is not "identical" to that of EP '833, so for this reason alone, at least claim 12 and its dependent claims, and further claim 9, which also recites $m = 100$, cannot be anticipated under § 102(b).

Nevertheless, to advance prosecution, Applicants have amended claim 12, as discussed above, to include a specific viscosity limitation for the emulsion of the claimed invention. EP '833 is silent as to viscosity measurements, and therefore does not teach each and every claim element of the rejected claim. Accordingly, EP '833 cannot be said to anticipate the present claims under § 102(b) and the rejection should be withdrawn.

IV. Rejections Under § 103(a)

A. Rejection Over EP '332

Claims 1-19, 23-33, 36, 37, and 39-66 have been rejected under 35 U.S.C. § 103(a) as unpatentable over EP 0 374 332 ('332) for the reasons set forth at pages 7-8 of the present Office Action. The Applicants respectfully traverse the rejection for the reasons set forth below.

Three elements are required to establish a *prima facie* case of obviousness: (1) there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art,

to modify the reference or to combine reference teachings, (2) there must be a reasonable expectation of success, and (3) the prior art reference (or references when combined) must teach or suggest all the prior art limitations. See M.P.E.P. § 2143. With respect to EP '332, the Office has failed to satisfy any of these three requirements with respect to claims 12-66, and at least one of these requirements with respect to claims 1-11.

First, a reference is sufficient under §103 when it suggests a proposed substitution to one skilled in the art having the reference before him. *In re Linter*, 458 F.2d 1013, 1016, 173 USPQ 560, 562 (CCPA 1972). With respect to the present composition claims, e.g., claim 12, there is no such suggestion in EP '332, i.e., to modify the reference to encompass the forms recited by the present invention. EP '332 is clearly directed toward a "solid cosmetic composition," (page 3, lines 3-4), whereas claim 12, as amended, recites a non-solid, as evidenced by the new claim limitation regarding the viscosity of the inventive composition. Further, if one reads claim 12 in light of the specification, as one must, the present specification states that the composition of the invention "may be in the form of a thickened emulsion, fluid emulsion, a cream, a milk or a serum" (page 20, lines 19-20). Certainly, no such recitation is in EP '332.

Second, a reference can be modified to render claims *prima facie* obvious only if there is a reasonable expectation of success. *In re Merck & Co., Inc.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). With respect to claim 12, one skilled in

the art could not reasonably expect to be successful in obtaining one of the fluid forms of the present invention from a reference teaching solids. In fact, by teaching solid compositions, EP '332 actually teaches away from the present invention.

Third, for *prima facie* obviousness, all of the limitations of the claims must be taught or suggested by the reference. *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974). As discussed above, the Applicants have amended claim 12 to include a specific viscosity limitation. In contrast, EP '332 neither teaches nor suggests these specific limitations nor any viscosity limitation, particularly as it is impossible for one to measure the viscosity of a solid. With respect to process claims 1, 2 and 66, use of the silicones for the purposes of reducing or eliminating transfer or migration, improving staying power, or providing non-therapeutic treatment is neither taught nor suggested in EP '332. EP '332 is directed toward use of the silicones for stabilizing the emulsion (see, e.g., page 5, lines 37-42). Simply put, EP '332 does not teach or suggest all of the limitations of the present claims.

Accordingly, because a *prima facie* case of obviousness has not been made, the Applicants respectfully request that the §103 rejection over EP '332 be withdrawn.

B. Rejection Over EP '833

Claims 1-19, 23-33, and 36-66 are rejected under 35 U.S.C. § 103(a) as unpatentable over EP 0 331 833 ('833) for the reasons set forth on page 8 of the

Office Action. The Applicants respectfully traverse the rejection for the reasons below.

The requirements of M.P.E.P. §2143 are set forth above. Here, the Office has failed to satisfy at least one of these requirements. First, EP '833 does not teach or suggest all of the limitations of the claims of the present invention. Specifically, as amended, claim 12 recites an emulsion with a specific measurable viscosity. EP '833, in contrast, does not teach or even remotely suggest this specific viscosity limitation and, therefore, it is inadequate to render the present claims obvious.

Additionally, EP '833 requires a water-swellable clay, a solid, as a component. There would have been no motivation for one of ordinary skill in the art to modify EP '833 to omit this required component simply to obtain the presently claimed invention. This is yet another reason why EP '833 cannot and does not render the present claims obvious.

Finally, as for claims 1, 2 and 66, use of the silicones for the purposes of reducing or eliminating transfer or migration, improving staying power, or providing non-therapeutic treatment is neither taught nor suggested in EP '833. EP '833 is directed toward use of the silicones for stabilizing the emulsion (see, e.g., page 3, line 54 - page 4, line 4). Simply put, EP '833 does not teach or suggest all of the limitations of the present claims.

Accordingly, the Applicants respectfully request that this rejection be withdrawn.

C. Rejection Over EP '332 or EP '833 in view of US 5,593,680

The Office has rejected claims 20-22 under 35 U.S.C. § 103(a) as unpatentable over either EP 0 374 332 or EP 0 331 833, as applied to claims 1-19, in view of US 5,593,680 (US '680). The Applicants respectfully traverse the rejection.

In support of its rejection, the Office cites *In re Crockett*, 279 F.2d 274, 276-77, 126 USPQ 186, 188 (CCPA 1960) for the proposition that combining EP '332 or EP '833 with US '680 "flows logically from their having been individually taught in the prior art." However, without some objective reason to combine the teachings of the references, the fact that all aspects of the claimed invention were individually known in the art is not sufficient to establish a *prima facie* case of obviousness. See M.P.E.P. § 2143.01 (citing *Ex Parte Levengood*, 28 USPQ2d 1300 (Bd. Pat. App. & Inter. 1993); *AI-Site Corp. v. VSI Int'l Inc.*, 174 F.3d 1308, 50 USPQ2d 1161 (Fed. Cir. 1999)). The Office must present a convincing line of reasoning supporting its rejection. *Ex Parte Clapp*, 227 USPQ 972 (Bd. Pat. App. & Inter. 1985).

In the present case, the Office contends that the motivation to combine the references "flows logically from the art for colored cosmetic compositions." The Applicants disagree. EP '332 and EP '833 and their deficiencies have been discussed at length above. US '680 does not remedy the problems of the EP references. US '680 is directed to microsphere-containing compositions that are free of fats, e.g., oils. In contrast, the compositions of the present invention do not

require microspheres and do require fats, specifically silicones (oils, waxes, etc.). Accordingly, the motivation to combine US '680 with the silicone-containing compositions of the EP references in order to obtain the presently claimed invention is non-existent. Further, there would have been no reasonable expectation of success in making such a combination. Finally, US '680 recites compositions that are in the form gels, not emulsions, as required by the present claims. Thus, as the Office has not cured the deficiencies of the primary references, this rejection relying on the secondary reference US '680 must fail for lack of support.

Accordingly, the Applicants respectfully request that the rejections with respect to claims 20-22 be withdrawn, as no *prima facie* case of obviousness has been established.

D. Rejection Over EP '332 or EP '833 in view of US 5,478,555

Claims 34-37 are rejected under 35 U.S.C. § 103(a) as unpatentable over either EP 0 374 332 (EP '332) or EP 0 331 833 (EP '833) each as applied to claims 1-30 above, and further in view of US 5,478,555 (US '555). The Applicants respectfully traverse.

The Office argues that it would have been obvious to one of ordinary skill in the art at the time of the invention to prepare the compositions of either EP '332 or EP '833 and use the silicone waxes as taught by US '555 with the reasonable expectation of producing a cosmetic composition. However, there is no motivation to

combine US '555 with either of the primary references, and US '555 does not remedy the deficiencies of the primary references as set forth above. In other words, the Office has not demonstrated a suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to combine the cited references. Specifically, US '555 teaches that using large amounts of the silicone waxes of the present invention in compositions led to "relatively unstable emulsions" that were unsuitable for make-up products. (col. 1, lines 29-38.) With this teaching in mind, one of ordinary skill in the art would hardly have been motivated to take these silicone waxes and use them in the compositions of the EP references.

As the Office has not cured the deficiencies of the primary references, this rejection relying on the secondary reference US '555 must fail for lack of support.

For at least the foregoing reasons, the present claims are nonobvious, and the Applicants respectfully request withdrawal of all § 103(a) rejections.

V. Objections Due to Informalities

Claims 23 and 24 have been objected to because of typographical errors. The Applicants thank the Office for pointing out these inadvertent errors and have

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amended the claim accordingly. Accordingly, the Applicants respectfully request withdrawal of these objections.

VI. Conclusion

In view of the foregoing remarks, the Applicants respectfully request the reconsideration and reexamination of this application and the timely allowance of the pending claims.

Please grant any extensions of time required to enter this response and charge any additional required fees to our deposit account 06-0916.

Respectfully submitted,

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